In my opinion it is clear that by virtue of rule 14 the steps taken and the proceedings commenced against the plaintiff under the 1962 Regulations must be deemed to have been taken and commenced against him under the 1964 Rules. It follows on the undisputed facts that the disciplinary proceedings against the plaintiff had on the 22nd October 1964 reached the stage where the Public Service Commission had considered the report of the committee of inquiry appointed by it and had decided that on the report the plaintiff should be dismissed from the public service. All that remained to be done was for the Public Service Commission to dismiss the plaintiff by acting under rule 4(14)(a) of the 1964 Rules which provides that the "Public Service Commission may, upon considering the report of the Committee, if it is of the opinion that the public officer should be dismissed or be reduced in rank, dismiss or reduce the rank of the public officer from such date as it may think fit;."

It seems to me, having regard to the letter of dismissal dated 27th September 1965, that the Public Service Commission had acted under rule 4(14)(a) of the 1964 Rules and was entitled to so act by virtue of rule 14, the whole purpose of and the proper interpretation of the latter rule being to enable disciplinary proceedings commenced under the 1962 Regulations but not completed before the 1964 Rules came into force to be lawfully continued to a conclusion under the 1964 Rules without the necessity for fresh disciplinary proceedings having to be commenced.

With regard to the submission that the Public Service Commission had no power under the Constitution or under any other written law to dismiss the plaintiff the argument runs thus. The 1963 Constitution does not expressly vest the power to dismiss public servants in the Public Service Commission whereas article 132(2A) of the Constitution of Malaysia which has constitutional force in Singapore after 9th August 1965 in spite of the separation of Singapore from the Federation of Malaysia impliedly vests the power of dismissal in the President of the Republic of Singapore. This article 132(2A) enacts the common law rule that all public servants hold office during the pleasure of the Crown and since it has been decided that a person who holds office during the pleasure of the Crown can be dismissed from office at will without cause assigned, therefore, a public servant can be dismissed from office by the President. This being so it can be said that by necessary implication the power of dismissal of public servants is constitutionally vested in the President.

The contrary submission on behalf of the Attorney-General is that article 75 of the 1963 Constitution read with the Interpretation and General Clauses Ordinance (Chapter 2), now replaced by the Interpretation Act 1965, vests the power of dismissal in the Public Service Commission and that the said article 132(2A) ought not to be construed to mean more than it says. All that it says and must mean is that, except as expressly provided by the Constitution, no public servant has security of tenure. It is submitted that this must be the true meaning of the said article 132(2A) as otherwise article 135(1) of the same Constitution would be meaningless as the latter article expressly declares that, *inter alia*, no member of the public service of each State in the Federation of Malaysia "shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of dismissal or reduction in rank, has power to appoint a member of that service of equal rank." It is submitted that if the President is the sole dismissing authority on the true construction of article 132(2A) then there would be no necessity to enact article 135 because there could be no authority which is not subordinate to the President.

I accept the submission put forward on behalf of the Attorney-General and it seems to me to give full weight and effect to the constitutional provisions relating to the public service. To hold otherwise would place public officers under the control of the executive for the President must, constitutionally, act in accordance with the advice of the executive. The Public Service Commission on the other hand is, under the 1963 Constitution, an independent authority, independent of executive control and as provided by article 75 of the 1963 Constitution is the authority to exercise disciplinary control over public officers. It is common ground between the parties that article 75(1) of the 1963 Constitution confers on the Public Service Commission the power to appoint and to exercise disciplinary control over public officers. In my view, apart from the Interpretation Act 1965, a power to appoint must necessarily imply a power to dismiss unless the power of dismissal is expressly vested in some other person or authority. Furthermore it is, in my opinion, clear that a power to exercise disciplinary control enables that power to be exercised in the form of dismissal, unless the power of dismissal is expressly vested in some other person or authority.

However, I must not be taken to have decided that article 132(2A) read with article 135(1) of the Malaysian Constitution and the 1963 Constitution cannot be construed to enable the President to dismiss a public officer. In my opinion the President has by virtue of article 132(2A) a residual power of dismissal, a power, however, which he must exercise, subject to article 135(2) *i.e.* the reasonable opportunity to be heard rule — so that in practice it would be a power which will hardly, if ever, be exercised at all.

For all these reasons I would dismiss the action with costs.

Action dismissed.

Solicitors: *S. K. Lee & Co.*

K.S. ROBERTS v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) July 7, 1970]

[Kuala Lumpur — Criminal Appeal No. 22 of 1970]

Penal Code, s. 292(a) — Obscene publication — Publicly exhibiting for sale an obscene book — Approved publication — Retailer — Knowledge — Strict liability.

Criminal Law and Procedure — Identification — "Proved" — Evidence Ordinance 1950, s. 3 — Test.

In a case under section 292(a) of the Penal Code knowledge that the publication is obscene need not be proved. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence.

A publication is an obscene publication if only a part of it is obscene.

Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excluded from its orbit blind faith of a true believer, because prudence and credulity do not go together.

Case referred to:-

(1) *Ranjit D. Udeshi* v. *State of Maharashtra* A.I.R. 1962 Bombay 268; on appeal A.I.R. 1965 S.C. 881.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ponnudurai for the appellant.

Hashim bin Abdul Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: The appellant was convicted for an offence under section 292(a) of the Penal Code *viz.*, publicly exhibiting for sale an obscene book, to *wit* one copy of *Majallah Filem Malaysia*, October 1969 issue. He was fined $60/- in default 2 weeks imprisonment. I dismissed the appeal against conviction and intimated that I would give my reasons later. I now proceed to do so.

Majallah Filem Malaysia is an approved publication but an article appearing in it offends against the recognised standards of propriety and is therefore obscene. That is not challenged.

One of the grounds of appeal is that the publication is an approved publication by the Government and therefore not an obscene publication. Counsel's argument is that a publication which contains an obscene article is not obscene because it is an approved publication. I think there is a fallacy in the argument. In my view the word "approved", strong as it is, cannot be read without any qualification. It does not mean *extra legem*. We boast of being a free democratic country but that does not mean that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only a part of it is obscene (see *Ranjit D. Udeshi* v. *State of Maharashtra*).[1]

The conviction is impugned on another ground that the appellant has no knowledge that the publication is obscene as he is only a retailer and therefore not expected to know what is contained in every publication. The argument is based on the false premise that before a person is found guilty of selling or keeping for sale any obscene publication, the prosecution must prove that he "knows" that the publication is obscene. In a case under section 292(a) of the Penal Code knowledge that the publication is obscene need not be proved. If the law is otherwise it would place an intolerable burden on the prosecution. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence.

A third ground of appeal is that the learned magistrate had failed to direct his mind as to the identification of the appellant. The evidence shows that the police constable (P.W. 1) who raided the shop saw the impugned publication displayed for sale but when giving evidence in court he had failed to identify the accused. The investigation officer (P.W. 3) in his testimony said that in the course of investigation he went to the said shop where he saw the accused and that he checked the business license, which he produced as Exhibit P. 3. The said license discloses the name of the accused.

Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

In my view and so is the view of the lower court the evidence of identification has fulfilled this test. There is sufficient evidence to establish the accused's identity.

Appeal dismissed

YAP CHOO HOO v. TAHIR BIN YASIN & ANOR.

[O.C.J. (Sharma J.) July 9, 1970]

[Malacca — Civil Suit No. 185 of 1967]

Evidence — Documents — Agreed bundle — Whether document forming part of, automatically stands proved both as to its existence, due execution and contents without having to be in any way or manner proved — Evidence Ordinance, 1950, s. 3 — Practice Notes.

Practice and Procedure — Agreed bundle of documents — Practice note cannot override provisions of Evidence Ordinance, 1950.

In this case the plaintiff had put in an agreed bundle consisting of seven documents. Counsel for the defendants maintained that once a document forms part of an agreed